Supreme Court, U.S.
FILED

(1)

021143 DEC 16 2002

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH P. PEROT SR. ("pro se")
Petitioner,

vs.

McDONALD'S CORPORATION "et al"
Respondent(s),

ON PETITION FOR WRIT OF CERTIORARI TO

The United States Court of Appeals for the Fifth Circuit .

PETITION FOR WRIT OF CERTIORARI

Joseph P. Perot Sr. ("pro se")
4908 Tamarisk Street
Bellaire, Texas 77401
Phone & Fax Number: 713-661-2176

26 pp

QUESTION(S) PRESENTED

1.) Did the Fifth Circuit Court of Appeals and the District Court ignore well established Texas Law, and Federal Law in their decisions regarding a breach of a 20 year "Ground Lease" dispute in Texas and in doing so unlawfully enforce a settlement agreement?

2.) Did the Fifth Circuit Court of Appeals and the District Court abuse its discretion and make erroneous findings by the court's dismissal of the claim for 1st, "lack of subject matter jurisdiction" then continue to hear and rule on other issues in the claim?

3.) Did the Fifth Circuit abuse its discretion and deny due process, and equal access to the judicial system by sanctioning Perot?

4.) Did the Fifth Circuit Court of Appeals and the District Court (with Judge Harmon presiding) disregard the earlier ruling and order of District Court Judge Hoytt ?

5.) Did the Fifth Circuit Court disregard its earlier rulings and findings as well as those of an arbitrator, and Federal District Judge Hughes in 1997?

6) Did the Fifth Circuit & Judge Harmon deny Perot DUE PROCESS by dismissing the case before discovery and deny my Motion to Compel.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Joseph P. Perot Sr.,
4908 Tamarisk Street
Bellaire, Texas 77401

Marsha Arriens Perot
4908 Tamarisk Street
Houston, Texas 77401

McDonald's Corporation,
Oak Brook, Illinois

Stewart Title Company,
1910 South Post Oak
Houston, Texas

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **Federal courts:**

The opinion of the United States court of appeals appears at Appendix __A__ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix __B___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

[x] For cases from **Federal courts:**

The date on which the United States Court of Appeals decided my case was August 19, 2002 - .

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 16, 2002, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No ._____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statute of Fraud

Due Process

Equal right to the Court

Breach of Contract

Right to a jury Trial

STATEMENT OF THE CASE

Please help me. Read the entire Record in particular Appellants Record Excerpts it is not voluminous . 1)Appellant, Perot believes there is presently a binding 20 year Lease Agreement between Perot and McDonald's Corporation and money $60,000 from this Lease is now due Perot. On September 24, 1997 all conditions entitling me to the money were met. 5) In 1996 a different agreement pertaining to this Lease was argued before an Arbitrator (Mr. Fisher), Federal District Judge (Hughes), and the U. S. Fifth Circuit Court of Appeals, all said that any agreement concerning the Lease **to be binding, must be approved by an "authorized officer" of McDonald's and must be in writing, signed by both Perot and McDonald's Corporation.** ***see R. page 51 para 21 & page 52 para c or Appellant R E appendix a, para 21& C or "lease agreement page 13 para. 21" & page 12 para C.*** And because there has not been a single signed document produced purported to be a Settlement Agreement between Perot and McDonald's Corporation that would cancel, waive, or in any way alter this Lease the Lease must be ruled in full force and effect.

Today the 5th Circuit Court of Appeals and U.S. District Court, Judge Ruth Harmon presiding wants to enforce that settlement offer made in 1997 before Federal Judge Hoytt. It was only an offer because an "authorized officer" of McDonald's had not accepted the agreement and neither party had "signed on the dotted line." and McDonald's was not releasing the property until then. ***see R 91 McDonald's attorney, Mr Ashcraft's statement page 67 at lines 17 & 18.***

There were conditions precedent to a binding agreement. McDonald's said in their Brief to the Arbitration in 1996 that I, Perot knew that an "authorized officer" of McDonald's had to approve any agreement concerning the Lease, and it had to be writing and signed by both Perot and McDonald's. ***see Appellants R E tab I or R pgs 137 thru 144.***
If they say I knew, then they know that there was not and is not a settlement agreement between McDonald's and Perot. It had to be approved by McDonald's and must be in writing signed by both parties, and McDonald's continues to hold the property. Stewart & McDonald's are misleading the courts. A Texas case that mirrors mine.

see Castroville Airport v. City of Castroville (Tex. App. -San Antonio 1998) 974 S.W. 2d 207

1.*city council approval of settlement was condition precedent to its enforcement,*

2. *genuine issues of material fact existed as to weather settlement memorandum was conditioned upon execution of a final written agreement (if a party rejects a settlement or other agreement before the performance of a condition precedent to the initial formation of the agreement, the settlement or other agreement may never become enforceable because at the time the condition is satisfied, there would not be an offer and acceptance. also Condition precedent may be either a condition to the initial formation of a contract or to an obligation to perform under an existing agreement.)*

2)The Federal Courts "Lacked jurisdiction" and should have at that point dismissed Perot's case. The Courts failed to follow their previous rulings and of other Federal Courts.

(0)"Furthermore, [w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. **Quote from 5th Circuit opinion cause #97-11182 @ page 6 Carol Rae Cooper Foulds v. Texas Tech University**

See also **Marathon Oil v. Ruhgas ,U.S. Court of Appeals for the Fifth Circuit # 96-20361** *"[t]he appropriate course [for a federal court] is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss*

The case before you today was dismissed for #1 lack of subject matter jurisdiction. The Court should have stopped there and all other issues should be moot. The Court did not stop, they continued to rule on other claims in the case. **6)**And then denied Perot due process by denying all of Perot's Motions, even to file an amended complaint. Then the 5th circuit and the District Court denied Perot's Motion to compel McDonald's to at least produce the "settlement agreement" referred to in the Courts' order of dismissal under**12(b)(6).see Appendix D and R art. #21** You would think I would be entitled to the document and have asked McDonald's to produce a copy McDonald's refused.

The document was not signed and contained material modifications and would have shown that McDonald's "authorized officer" did not accept the offer as made before Judge Hoytt, therefore there was not a binding agreement. The document would show McDonald's had not accepted the offer. Negotiations and offers do not make a binding agreement. The Court fails to state which one of the offers is the agreement or is the courts saying both or neither?

3) The Fifth Circuit Court of Appeals wrongly sanctioned Perot calling the sanction "Harsh". It was indeed "harsh" we live on social security disability and more it was unjust and unfair and meant to further deny us from using the courts pro se. Denying me due process and holding Perot to a higher standard than even lawyers before the court. ie A cause **#02-20343 Fleming & Associates L.L.P. Plaintiff - Appellant** dated August 12, 2002 out of the same District Court, same Judge Harmon as my case. no sanction here The Fifth Circuit wrote

" The advocate is duty bound to protect his clients interests, and choices of venue and timing belong to him.

But the court has the power, indeed the duty , to remind counsel that they are professionals and order their return to the playing field."

4) There were conditions precedent placed on the offer by Judge Hoytt on September 16, 1997 he stated in the **Record page 66 line 15 thru 16** "what ever you think is necessary to make these documents binding or the representations binding on paper." He gave us 90 days.

On Nov. 14, 1997 I canceled all settlement offers *.see Record p. 182 or Appellant's RE tab D* McDonald's knew then there was not a binding agreement or even an offer and McDonald's never went back to the Court.

REASONS FOR GRANTING THE PETITION

(1) The Lower Court lacked jurisdiction.

(2) Injustice was done by the final determination of the suit, and injustice was not caused by Appellant's own inexcusable neglect. (Rule 578)

CONCLUSION

There is presently a binding 20 year ground Lease between Perot and McDonald's and $60,000 is due Perot. The Fifth Circuit abused its discretion and denied Perot due process and equal access to the courts by sanctioning Perot and by denying Appellant, Perot's Motion to Compel McDonald's to produce the "Settlement Agreement". This case was originally in Texas state court and lacking jurisdiction in Federal court it should be sent back to Texas state court. The Fifth Circuit and the District Court completely disregarded the laws of the State of Texas, and Federal rules in their decisions in this case. The Lower courts decisions were unjust.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Joseph P. Perot Sr.
Joseph P. Perot Sr. (pro se)

Date: December 11, 2002.

Appendix A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20176
Summary Calendar

Joseph Perot Sr. ; Marsha A. Perot,

Plaintiffs-Appellants

vs.

McDonald's Corporation; Stewart Title Company,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Texas, Houston
(H-01-CV-3167)

Before Jolly, Parker, and Clement, Circuit Judges.

PER CURIAM: (Filed Aug. 19 2002)

Joseph and Marsha Perot, pro se, appeal the district court's judgment dismissing their complaint against McDonald's Corporation and Stewart Title Company. The district court held that it lacked subject matter jurisdiction of the claim against Stewart Title Company and that the complaint failed to state a claim upon which relief could be granted against McDonald's Corporation.

Pursuant to the 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

The appeal is dismissed as frivolous. *See 5th Cir. R. 42.2.* The district court's ruling that it lacked subject matter jurisdiction over the claims against Stewart Title Company was proper because, as is apparent from the face of the complaint, diversity jurisdiction is lacking inasmuch as both the Perots and Stewart Title Company are citizens of Texas. The district court also properly dismissed the Perots' claims against McDonald's Corporation, both because the identical claims were dismissed in a prior action and because the claims are time-barred.

Stewart Title Company's motion for sanctions pursuant to Federal Rule of Appellate Procedure 38 is GRANTED. The Perots' appeal of the dismissal of their claims against Stewart Title Company is utterly frivolous and without merit. They do not even make any attempt to challenge the district court's ruling that it lacked subject matter jurisdiction over those claims, either in their appellate briefs or in their response to the motion for sanctions. Accordingly, we direct the Perots to pay Stewart Title Company sanctions in the amount of $1000 plus double costs. We also warn the Perots that any future abuse of the appellate process in cases filed with this court will surely result in harsher sanctions.

DISMISSED; SANCTIONS IMPOSED; WARNING ISSUED

ATTEST: /s/ CHARLES R. FULBRUGE III
CLERK, U.S. COURT OF APPEALS,
FIFTH CIRCUIT

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH PEROT SR., AND MARSHA A. PEROT,

Plaintiffs

VS. CIVIL ACTION NO. H-01-3167

McDONALD'S CORPORATION AND STEWART TITLE COMPANY

Defendants

ORDER OF DISMISSAL

(Filed Jan. 11 2002)

Pending before the Court in the above referenced, declaratory judgment action, alleging breach of contract (a Ground Lease, Arbitration Agreement, and Amendment to the Arbitration Agreement), negligent misrepresentation, and intentional infliction of emotional distress relating to property owned by pro se Plaintiffs Joseph Perot Sr. and Marsha A. Perot ("the Perots") that Defendant McDonald's Corporation ("McDonald's") agreed to lease for a restaurant, are the following motions: (1) McDonald's motion to dismiss Plaintiffs original complaint (instrument #5) for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted, pursuant to Federal Rule of Civil Procedure 12 (b)(1) and 12(b)(6); (2) Defendant Stewart Title Company's ("Stewart's") motion to dismiss Plaintiffs' original complaint for lack of subject matter jurisdiction (#9); and (3) the Perots' motion to dismiss Defendants' motions (#10).

The Perot's have also filed an amended complaint (#11) without requesting leave of court, that deletes all causes of action except the one for breach of contract and narrows that cause of action to the May 31, 1995 Arbitration Agreement and the August 10, 1995 Amendment to the Arbitration Agreement.

McDonald's motion points out that the Perots allege federal jurisdiction based solely on diversity under 28 U.S.C. §1332. Nevertheless, the first page of the initial complaint states that Plaintiffs and Stewart are citizens of Texas, and therefore diversity does not exist. A Court can grant a motion to dismiss for lack of subject matter jurisdiction based on the face of the complaint. Williamson V. Tucker, 645 F.2d 404, 412-13 (5th Cir. 1981), cert. denied, 454 U.S. 897 (1982).

McDonald further moves to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. McDonald's contents that in 1996 Plaintiffs filed an identical suit in this court, H-96-1013, Joseph Perot et ux v. McDonald's Corp. ,1 which was dismissed by Judge Hoyt on announcement of settlement, which was read into the court's record on September 16, 1997 and agreed to by the Perots on the record. On January 2, 1998 Judge Hoyt denied the Perots' motion to reinstate. No appeal was taken. As attachments to its motion McDonald's provides copies of the first fourteen pages of Plaintiffs' amended complaint, the portions of the transcript of the announcement of settlement, Judge Hoyt's dismissal order, signed on September 16, 1997, and Judge Hoyt's order denying the motion to reinstate.

Stewart's motion also notes that it, like Plaintiffs, is a citizen of Texas, as reflected on the first page of the complaint. The Perots' response is that because they and McDonald's are citizens of diverse states, Stewart can be joined under Federal Rule of Civil Procedure 20(a) for permissive joinder. They further argue that Judge Hoyt's dismissal was without prejudice. As reflected by the transcript of the settlement hearing, Judge Hoyt, when expressly asked if the dismissal was with prejudice, responded not at this point, but that if counsel wanted a dismissal with prejudice, counsel should file an order of dismissal with prejudice after documentation had been completed. The Perots argue that no such order was submitted or signed, so they can reurge their claim.

The Perots misapply Rule 20(a) here. First, Stewart has already been named as a party in both the original and amended complaints, and therefore there is no joinder to be made.

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1 Stewart was not a party to the earlier suit.

Second, even if Plaintiffs had filed their suit against McDonald's and then sought to join Stewart, Rule 20 is procedural only and does not affect jurisdictional requirements, i.e., there must still be an independent basis of subject matter jurisdiction. Sunpoint Securities, Inc. v. Porta, 192 F.R.D. 716, 718 (M.D. Fla. 2000) If Stewart were joined, there would be no diversity jurisdiction. No party has claimed that federal question jurisdiction is present here. Therefore Stewart's motion to dismiss must be granted.

Second, Plaintiffs' fail to controvert the evidence presented by McDonald's that this issue was finally resolved after Plaintiffs failed to appeal Judge Hoyt's order of dismissal based on a settlement agreement announced in open court, agreed to under oath by Plaintiffs, and Judge Hoyt's order denying Plaintiffs' request to reinstate.

This Court notes Judge Hoyt's order of dismissal was based on a "90 day order," which would permit the parties to move for reinstatement within ninety days if the settlement were not consummated. Apparently the Perots did not sign the settlement agreement, fired their attorney, and sought reinstatement. Judge Hoyt's denial of that motion made the dismissal, final, regardless weather it was with or without prejudice. The court does not construe the dismissal without prejudice as an invitation for Plaintiffs to file the same claims in the same court several years later. Even if the dismissal were not a bar to such repetition, because Plaintiffs filed this new suit September 14, 2001, and because Plaintiffs' original complaint clearly alleges McDonald's breached its obligation under the Amendment to the Arbitration Agreement (the last of the contracts in dispute to be negotiated) in 1995, their claims are time-barred under the four-year statute of limitations for breach of contract in Texas and their two-year statutes of limitations for the tort claims. Tex. Civ. Prac. & Rem. Code Ann. §§ 16.003 and 16.004 (Vernon Supp. 2001).

Accordingly, the court

ORDERS that Stewart's motion to dismiss is GRANTED for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and McDonald's motion to dismiss is GRANTED with prejudice under Federal Rule of Civil Procedure 12(b)(6)

SIGNED at Houston, Texas, this 10 th day of January, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 02-20176

JOSEPH PEROT, SR; MARSHA A. PEROT
Plaintiffs--Appellants

v.

McDONALD'S CORPORATION;-STEWART TITLE COMPANY
Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING
(Filed Sep.16 2002)

Before Jolly, Parker, and Clement, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED__

ENTERED FOR THE COURT:
/s/ E. Grady Jolly___
United States Circuit Judge
REHG-21

Appendix D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No 02-20176

JOSEPH PEROT, SR; MARSHA A. PEROT
Plaintiffs--Appellants

V.

McDONALD'S CORPORATION; STEWART TITLE COMPANY
Defendants-- Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ORDER: (Filed Apr. 26, 2002)

IT IS ORDERED that appellants' motion to compel production of the Settlement Agreement between McDonald's Corporation and the Perots is DENIED. This appeal will be decided on the record the parties made in the district court.

/s/ /s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

Appendix E.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH PEROT, SR; AND MARSHA A. PEROT Plaintiffs,

VS. CIVIL ACTION NO. H-01-3167

MCDONALD'S CORP. & STEWART TITLE COMPANY, Defendants

ORDER
(Filed Feb. 6, 2002)

Pending before the Court in the above referenced, declaratory judgment action, which the court dismissed on January 11, 2002 without prejudice for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) as to Defendant Stewart Title Company and with prejudice under Rule 12(b)(6) as to Defendant McDonald's Corporation, is pro se Plaintiffs Joseph Perot Sr. and Marsha A Perot's motion to stay, set aside and compel (instrument #18). For reasons indicated in its previous orders, the Court

ORDERS that the motion is DENIED. Plaintiffs shall file no more motions in this action or sanctions may be imposed by the Court.

SIGNED at Houston, Texas, this 5th day of February, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE